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SUPREME COURT OF THE UNITED STATES

October Term,
1992

JEAN WOERNER, Plaintiff-Petitioner vs. HARRY BRUNT, M.D., Defendant-Respondent	PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should exercise its discretion to grant review on certiorari, where the decisions complained of did not decide a federal question, let alone conflict with the decisions of other state courts of last resort or other U.S. Court of Appeals, nor did such decisions entail any aspect of question of federal law, let alone one which has not been but should be decided by this Court, or which conflicts with any applicable decisions of this Court.

2. Whether the plaintiff is entitled to review in this Court, where plaintiff's malpractice claim against defendant was dismissed for failure to present a prima facie case supported by expert testimony with regard to the standard of care and deviation therefrom.

3. Whether the plaintiff is entitled to review in this Court, where plaintiff's malpractice claim against defendant was dismissed for failure to present a prima facie case,

plaintiff having failed to present any evidence of proximate cause to establish a claim against the defendant.

PARTIES

The only other party to these proceedings is the Honorable Michael Farren, J.S.C., a judge of the Superior Court of New Jersey, Law Division, Monmouth County. While to the best of respondent's knowledge, the action against Judge Farren has not been concluded, the courts below apparently chose not to treat the matter as interlocutory. No one appeared for Judge Farren in the proceedings in the Superior Court, Appellate Division, nor in the Supreme Court of New Jersey.

CITATIONS OF OPINIONS AND JUDGMENTS OF THE COURTS BELOW

The trial court referred to N.J.S.A. 30:4-26.3, 30:4-6 et seq and long standing principles of New Jersey tort law.

The Superior Court of New Jersey, Appellate Division, referred to N.J.S.A. 30:4-26.3, Lanzet v. Greenberg, 126 N.J. 168, 594 A.2d 1309 (1991) and Rosenberg by Rosenberg v. Cahill, 99 N.J. 318, 492 A.2d 371 (1985).

The order of the Supreme Court of New Jersey refers to Rule 2:2-1(a), which provides that appeals may be taken to the Supreme Court from final judgments as of right in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State.

JURISDICTION

Defendant agrees that 28 U.S.C., section 1257(a) is the only possible jurisdictional basis for review in this Court.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

In this action, in which plaintiff seeks damages for professional malpractice from the defendant, no constitutional provision or statute is directly involved. However, N.J.S.A. 30:4-26.3, referred to in the Appellate Division opinion, is set forth at length in order to provide this Court with background. The section itself was repealed effective June 7, 1989.

That statute read as follows:

> "The Board of Chosen Freeholders of every county in this state shall designate one or more mental hospitals, as defined in this chapter as hospitals to which a magistrate or judge of any court, upon application by a police official as set forth herein may issue an order for an examination or for temporary hospitalization for purposes of observation, examination and treatment. The Board of Chosen Freeholders shall make provision for the proper care and maintenance of such persons so examined or hospitalized.
>
> The constables and police officers in the several townships, cities and other municipalities shall be authorized to apprehend any person whose behavior suggests the existence

of a mental illness, who shall on inspection be deemed to be dangerous to the public and they shall immediately take such person or persons so apprehended before the nearest county district court or municipal court which shall in a summary way inquire and determine whether an order for temporary hospitalization for purposes of observation, examination and treatment until discharged or removed therefrom as herein provided shall be issued.

An order for temporary hospitalization for purposes of observation, examination and treatment may be issued by a magistrate or judge of any court upon application by a police official and upon proof by him of the existence of the following circumstances: that upon ascertaining the available facts, the police official has concluded that the behavior of the person is such as to constitute a peril to life, person or property and further that the person's behavior suggests the existence of a mental illness, that he had made inquiry as to the person's next of kin or friend and had found that either none were available or that they were unwilling to apply for admission for the person; that he had made inquiry to determine whether a practicing physician had examined or would examine the person; that if a physician has, in fact, examined or could examine the person, the physician has confirmed the need for further examination, observation and treatment. An order for an examination at a mental hospital may

be made in the absence of a medical examination if the court finds that no physician is able or willing to conduct an examination into the patient's condition.

The aforesaid order when filed with the admitting physician of the hospital and upon his certification of the necessity for hospitalization shall be the warrant and authority for the admission and detention of the person for purposes of observation, examination and treatment for a temporary period not exceeding 15 days from date thereof, and the costs of such hospitalization shall be paid in the same manner as is provided in this title for patients admitted or committed to mental hospitals."

STATEMENT OF THE CASE

In accordance with N.J.S. 30:4-26.3, the text of which has been set forth in its entirety herein, a police official, in this case the Monmouth County Prosecutor, applied to the Superior Court, Law Division, Middlesex County, for an order for temporary hospitalization for purposes of observation, examination and treatment. The Monmouth County Prosecutor had concluded that Mr. Woerner's behavior constituted a peril to life, person or property and that his behavior suggested the existence of a mental illness. Again, pursuant to the statute, the Monmouth County Prosecutor requested that defendant Harry Brunt, M.D., examine Mr. Woerner to confirm the need for further examination, observation and treatment. By letter of August 28, 1986, Dr. Brunt opined that Mr. Woerner was mentally ill and in need of diagnosis and observation. Thereafter, the Monmouth County Prosecutor made application to Judge Nicosia in Superior Court, Law Division, Middlesex County

and presented proof that upon ascertaining the available facts, the Monmouth County Prosecutor had concluded that Mr. Woerner's behavior was such as to constitute a peril to life, person or property and that Mr. Woerner's behavior suggested the existence of a mental illness. Further proof was presented with regard to Dr. Brunt's opinion that there was a need for further examination, observation and treatment. The statute did not require and Dr. Brunt was not requested nor did he conclude that the behavior of Mr. Woerner was such as to constitute a peril to life, person or property. That conclusion was formulated by the Monmouth County Prosecutor based upon the available facts reflected by its own investigation. After Judge Nicosia reviewed those available facts, pursuant to the statute he ordered Mr. Woerner to be examined at Marlboro Psychiatric Hospital. Pursuant to Judge Nicosia's order, Mr. Woerner spent seven days at Marlboro Psychiatric Hospital.

Following his release from Marlboro

Psychiatric Hospital, Mr. Woerner sued Dr. Brunt for professional malpractice, seeking damages from Dr. Brunt for his failure to certify that Mr. Woerner was "a danger to himself or others or property if he is not so confined and treated".

In New Jersey, to prove a claim of professional malpractice, it is incumbent upon the plaintiff to establish the standard of care, a deviation therefrom and that any such deviation was the proximate cause of damage to the plaintiff. Despite being given opportunities to do so, Mr. Woerner came forward with no required expert proof that defendant Dr. Brunt deviated from any medical standard. Accordingly, defendant moved for summary judgment which was granted by the Honorable Robert T. Quackenboss, J.S.C. because of the absence of expert opinion and because of the absence of any proof of proximate causation. No constitutional issue was raised by the plaintiff in the trial court.

Mr. Woerner appealed as of right from the order of summary judgment dismissing the

complaint as to Dr. Brunt to the Superior Court, Appellate Division. The Appellate Division affirmed substantially for the reasons stated by Judge Quackenboss. Again, that court observed that plaintiff came forward with no required expert proof that defendant Brunt deviated from any medical standard. Plaintiff did not directly raise any constitutional issue in Superior Court, Appellate Division.

Pursuant to Rule 2:2-1(a) of the New Jersey Court Rules, there is no appeal as of right to the Supreme Court of New Jersey unless the case determined by the Superior Court, Appellate Division involves a substantial question arising under the Constitution of the United States or the State of New Jersey. (Other bases for appeal as of right are not Germane). While there is provision for petition for certification to the Supreme Court, which requires the exercise of discretion by that court in granting review, plaintiff chose to appeal purportedly as of right, for the first time asserting a substantial

constitutional question. The Supreme Court of New Jersey dismissed the appeal on the basis that the matter failed to present a substantial constitutional question.

Plaintiff now petitions for certiorari attempting to raise matters of federal questions in an attempt to seek further review from this Court.

SUMMARY OF THE ARGUMENT

Plaintiff's medical malpractice claim against the defendant was properly dismissed because plaintiff failed to present a prima facie case and accordingly, summary judgment was entered.

Defendant Harry Brunt, M.D., in accordance with N.J.S.A. 30:4-26.3, at the request of the Monmouth County Prosecutor, examined Jean Woerner and made a determination that Mr. Woerner was mentally ill. The provisions of that statute do not require that a physician, in this case Dr. Brunt, render an opinion that the behavior of Mr. Woerner constituted a peril to life, person or property. That conclusion was to be and was in fact provided by the Monmouth County Prosecutor to the court which entered an order admitting Mr. Woerner to Marlboro Psychiatric Hospital for purposes of examination.

While the statute under which defendant Dr. Brunt was requested to examine Mr. Woerner was repealed effective June, 1989, plaintiff never

sought to have the statute set aside as unconstitutional in violation of the United States Constitution, either on its face or as applied.

The dismissal of plaintiff's claim for tort damages against Dr. Brunt does not justify this Court's exercise of discretion in granting certiorari.

ARGUMENT

POINT I

THE DISMISSAL OF PLAINTIFF'S MEDICAL MALPRACTICE ACTION FOR DAMAGES, PREMISED UPON PLAINTIFF'S FAILURE TO PRESENT A PRIMA FACIE CASE, RAISES NO IMPORTANT QUESTION OF FEDERAL LAW WARRANTING THIS COURT'S EXERCISE OF DISCRETION AND ACCORDINGLY, THE PETITION FOR WRIT OF CERTIORARI MUST BE DENIED.

Rule 10 of the Rules of the Supreme Court of the United States dealing with considerations governing review on writ of certiorari, provides that a review on certiorari is not a matter of right but of judicial discretion which will be granted only when there are special and important reasons therefore. While not exclusively delineating the measure of the Court's discretion, Rule 10B presents the case where a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. Rule 10C raises the case where a state court has decided an important question of federal law which has

not been but should be settled by the United States Supreme Court or has decided a federal question in a way that conflicts with applicable decisions of the United States Supreme Court.

When comparing the considerations set forth in Rule 10 with the circumstance of this case, it becomes clear that there is no warrant for the Court's exercise of discretion in this matter. The Supreme Court of New Jersey found that the case did not involve a substantial question arising under the Constitution of the United States or the State of New Jersey. The standard of substantiality is not met where the issues involve an analysis of a particular factual situation and application of those facts through statutory and constitutional criteria under established principles. Piscataway Assoc., Inc. v. Township of Piscataway, 73 N.J. 546, 549 (1977). "Federal question" is not a shibboleth which will automatically entitle a litigant to review, either in the Supreme Court of New Jersey or in the Supreme Court of the United States.

Certainly a tort action for damages premised upon medical malpractice involves no federal question. Plaintiff's claims regarding due process and equal protection were raised only in the context of an attempt by the plaintiff to avoid dismissal of the complaint where he failed to provide expert testimony to establish the standard of care and deviation therefrom. In raising those issues, the plaintiff has repeatedly failed to grasp or has deliberately chosen to ignore the findings and reasoning of the trial judge in this matter. That court's reasoning is clearly set out in the opinion contained in plaintiff's petition for certiorari at pages 9 through 15 and as affirmed by the Superior Court, Appellate Division in its opinion as set forth in the petition for certiorari at pages 4 through 8.

Plaintiff has again glossed over the fact that N.J.S. 30:4-26.3 does in fact provide for a finding by a judge that the behavior of the person constitutes a peril to life, person or property, based upon proof presented, albeit not

by the physician but by the police official. Thus, as Judge Quackenboss pointed out in his opinion, ultimately it was the information provided by the Monmouth County Prosecutor with regard to the actions and behavior of Mr. Woerner which was the basis for Judge Nicosia's order of temporary hospitalization.

In his petition, plaintiff asserts that the state court decisions below conflict with this Court's decision in Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L.Ed. 2d 435 (1972), again failing to grasp or deliberately overlooking the distinctions between the situations of commitment under the involuntary commitment statutes and treatment of those who have been found not guilty by reason of insanity in criminal cases, as opposed to Mr. Woerner's brief stay pursuant to the order for temporary hospitalization. Moreover, plaintiff's attempt to raise federal questions herein only serves to obscure the real issue in this case, namely, whether Dr. Brunt's rendering an opinion that Mr.

Woerner was mentally ill, pursuant to the request of the Prosecutor's Office, as opposed to a certification that plaintiff was a danger to himself or others or property, constituted a deviation from accepted standards of medical care proximately resulting in damages to the plaintiff for which Mr. Woerner would be entitled to damages from Dr. Brunt. The resolution of that question was properly determined in the lower courts and certainly does not call for an exercise of discretion by this court. Accordingly, the petition for writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that plaintiff's petition for certiorari must be denied.

Respectfully submitted,

GROSSMAN & KRUTTSCHNITT

By_____
ELI L. EYTAN

October 29, 1992